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76-1389

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1976
No. _____

FRED MARVEL and ANGELA MARVEL,
d/b/a Marvel Photo
Appellants

vs.

UNITED STATES OF AMERICA
Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

James L. Edgar
EDGAR, MANIPELLA & HINDS
Suite 423 Skyline East
6111 East Skelly Drive
Tulsa, Oklahoma 74135
(918) 664-7020

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2. Whether, in the alternative, Appellants meet the requirements of the exception to 26 U.S.C. 7421 (a) as stated in Enochs vs. Williams Packing and Navigation Company, 370 U.S. 1, 7, 82 S.Ct. 1123, 1129 (1962).

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

Fred Marvel and Angela Marvel,
d/b/a Marvel Photo
Appellants

vs.

United States Of America
Appellee

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Fred Marvel and Angela Marvel, the petitioners herein, pray that a writ of certiorari issue to review the judgment of The United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on January 13, 1977.

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Tenth Circuit is reported at 548 F.2d, 295, and is printed in Appendix A hereto, infra, page 15 . The Journal Entry of Judgment of The United States District Court for the Northern District of Oklahoma is printed in Appendix A hereto, infra, page 25 .

JURISDICTION

The judgment of The United States Court of Appeals for the Tenth Circuit (Appendix A, infra, page 15) was entered on January 13, 1977. The jurisdiction of the Supreme Court is invoked under 28 U.S.C.A. Section 1254.

QUESTIONS PRESENTED

1. Whether 26 U.S.C. 7421 (a) constitutes a bar to injunctive relief where there is involved a suit for refund and abatement of employment taxes allegedly due and owing and where it is stipulated that irreparable harm will result to Appellants if Appellee seized Appellant's assets pursuant to the Assessment and Notice of Final Seizure.

2. Whether, in the alternative, Appellants meet the requirements of the exception to 26 U.S.C. 7421 (a) as stated in the Enochs vs. Williams Packing and Navigation Company, 370 US 1, 7; 82 S.Ct. 1123, 1129 (1962).

STATUTES INVOLVED

26 U.S.C. Section 7421 (a) :

> (a) Except as provided in section 6212 (a) and (c), 6213 (a) , and 7426 (a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

STATEMENT OF CASE

This is an appeal from the denial of Appellants' Motion for Restraining Order and Preliminary Injunction against the United States, to enjoin the United States from the collection of an assessment made by the Internal Revenue Service for allegedly unpaid FICA taxes, Federal Withholding, and Federal Unemployment taxes allegedly due and owing from the Appellants for the period of January 1, 1966, to and through December 31, 1971. Appellants' Motion for Restraining Order and

Preliminary Injunction was heard before the Honorable Allen E. Barrow, presiding, in the United States District Court for the Northern District of Oklahoma. The Order denying Appellants' Motion for Restraining Order and Preliminary Injunction was dated the 27th day of October, 1975. The Order was affirmed by the Tenth Circuit Court of Appeals on January 13, 1977.

The Appellants, Fred Marvel and Angela Marvel, d/b/a Marvel Photo, have their principal place of business at Tulsa, Oklahoma, where they engage in the business of a general photographic studio, specializing in passport and school photographs.

On February 5, 1974, the District Director of the Internal Revenue Service, Oklahoma City, Oklahoma assessed against the trade name "Marvel Photo", FICA taxes, Federal With - holding and Federal Unemployment taxes with respect to the period from January 1, 1966, through December 31, 1971.

On November 1, 1974, the District Director of the Internal Revenue Service issued a series of Final Notices Before Seizure concerning the amounts of alleged employment tax liability for the periods of time involved herein concerning "Marvel Photo". Said Final Notices Before Seizure stated that within ten (10) days after the date of said Notice, without any further notice, any bank accounts, receivables, commissions or any other income or property would be levied upon and/or seized. The date after which this seizure and/or levying could be accomplished was November 11, 1974.

On November 6, 1974, the Appellants paid the FICA taxes, Federal Withholding and Federal Unemployment tax assessments for one (1) alleged employee per taxable year involved, as per the list of purported employees compiled by the Internal Revenue Service.

On November 6, 1974, Appellants filed a Claim for Refund of the payment for each taxable year involved with the District Director of the Internal Revenue Service. A period of more than six (6) months elapsed without any action by the District Director of Internal Revenue Service upon said Claims for Refund by the Appellants. On May 29, 1975, Appellants filed a Suit for Refund and Abatement for the taxable years 1966 through 1971, as pertaining to the amount in question in

the United States District Court for the Northern District of Oklahoma. Concurrent with said suit for Refund and Abatement, the Appellants did file a Motion for Temporary Restraining Order and Preliminary Injunction to enjoin the Appellee from seizing and/or levying upon the assets of Appellants until the suit for Refund and Abatement could be heard.

Jurisdiction over the parties in the United States District Court for the Northern District of Oklahoma was granted by virtue of 28 U.S.C. 1346 (a) (1).

By stipulation of the parties for the purposes of the Motion for Restraining Order and Temporary Injunction, Appellants did show that irreparable harm would befall Appellants should the United States seize Appellants' assets pursuant to the assessment and Notice of Seizure involved in this case.

REASONS FOR GRANTING WRIT

I.

DUE TO THE FACT THAT THIS CASE INVOLVES A SUIT FOR REFUND AND ABATEMENT RATHER THAN RESTRAINT UPON ASSESSMENT AND COLLECTION, 26 U.S.C. 7421 (a) DOES NOT CONSTITUTE A BAR TO INJUNCTIVE RELIEF.

(A)

ONLY IN "PARTIAL PAYMENT" CASES OF EXCISE OR EMPLOYMENT TAXES IS THE COURT CONCERNED WITH INJUNCTIVE RELIEF.

By virtue of the fact that this is an appeal from the denial of injunction in a suit for refund and abatement of these taxes and injunctive relief for allegedly due employment taxes, the Anti-Injunctive Bar of Section 7421 (a) does not constitute a bar to injunctive relief in this instance.

The normal procedure for compliance with the jurisdictional requirement given in 28 U.S.C. 1346 (a) (1) in such a refund and abatement request is the complete payment of such assessed taxes to the IRS, the filing of a claim for refund of

this amount, waiting a statutory period of six months for action by the IRS upon such claim, and then the filing of suit for refund in the United States District Court. The bulk of income tax questions are litigated before the United States Tax Court which, by virtue of the litigation, does not allow the IRS to take any collection steps until the matter has been completely resolved. However, in the case of excise and employment taxes, there is no recourse to the Tax Court; the only remedy is that of a refund suit, after payment of the assessed taxes in the United States District Court.

The Courts of the United States have seen fit to mold an exception to the rule requiring the complete payment of all taxes allegedly due before jurisdiction can be established. In Flora v. United States, 362 U.S. 145, 80 S.Ct. 630 (1960) and further detailed in Steele v. United States, CCA NJ, 280 F. 2d. 89, (1960), it was held that in the case of excise and employment taxes, which were considered as being divisible per transaction or employee, jurisdiction could be bestowed upon the District Courts by virtue of the payment of the amount of taxes allegedly owing for one individual employee per taxable year involved, the making claim for the amount actually paid to the IRS for this one employee, and after the statutory six month period of action by the IRS, instituting suit for recovery of the monies paid as a means of settling the question of the validity of the assessments and requesting abatement of the remainder of the assessment.

However, this exception to the full payment rule raises the questions herein presented as to the proper considerations of remedies available under a suit for refund and abatement. Under the full payment rule, there is no issue as to the IRS in effect litigating the suit before or during court action by seizure of and levying upon the goods and monies of the party so assessed during the pendency of the refund suit, due to the fact that the entire amount of the assessment has already been paid. But, in a suit for refund and abatement, as here, brought under the divisable payment rule requiring only partial payment to gain the jurisdiction of the Court and asking for abatement of the remainder, this problem assumes great magnitude.

(B)

THIS HONORABLE COURT HAS INDICATED ITS INTEREST IN INJUNCTIVE RELIEF AS IT PERTAINS TO PARTIAL PAYMENT CASES ON SEVERAL OCCASIONS.

The Supreme Court of the United States has not ruled upon the question of the proper remedies under a suit for refund and abatement of assessed employment taxes. All of the cases decided by this Honorable Court have involved actions solely for the express purpose of obtaining injunctive relief. In no case has there been the payment of a portion of the tax assessed before the result for injunctive relief. In the case of Alexander v. Americans United, Inc., 416 U.S. 762 (1973), this Honorable Court held:

> ". . . we need not decide now the range of remedies available in such a refund suit, which, unlike this suit, is brought pursuant to congressionally authorized procedures."

Bob Jones University v. Simon, 945 S.Ct. 2038 (1974), holds:

> "Petitioner did not bring this case as a refund action. Accordingly, we have no occasion to decide whether the Service is correct in asserting that a District Court may not issue an injunction in such a suit, but is restricted in any tax case to the issuance of money judgments against the United States. . .We note, however, that the Service's position with regard to the range of relief available in a refund raises several considerations not presented by a pre-enforcement for an injunction. For example, it may be possible to conclude that a suit for a refund is not 'For the purpose of restraining the assessment or collection of any tax. . .' and, thus, that neither of the literal terms nor the principal purpose of Section 7421 (a) is applicable, Moreover, such a suit obviously does not clash with what the Court referred to in Williams Packing, supra, as a 'Collateral objection of the Act - protection of the collector from litigation pending a suit for refund.' "

(C)

PETITIONERS CANNOT BE FULLY PROTECTED IN A PARTIAL PAYMENT REFUND SUIT ABSENT INJUNCTION RELIEF.

This Honorable Court, while ruling upon the merits of an action solely for the purposes of injunctive relief, has stated that the proper legal remedy was a refund suit to litigate the issues involved. But, the Court has not yet been afforded the opportunity to litigate the remedies available under a refund and abatement suit. However, the Court has made it evident that the refund suit is the proper remedy at law. Under a full payment refund suit there is no danger of levy and seizure during the refund action; while under a refund and abatement action, there is ever present the danger of such action happening to Appellants, in effect, destroying Appellants' livelihood, even though they have complied with the requirements for putting this matter at issue in every instance. There remains nothing left that Appellants can do to protect themselves, their property, and their business during the time period in which it takes to litigate this case.

This Honorable Court has stated that a refund suit would be the proper and adequate remedy at law. However, the question arises as to whether the term "refund suit" refers solely to a full payment refund suit or includes a refund and abatement suit or whether the refund and abatement suit should be coupled with injunctive relief in order to be an adequate remedy at law.

Appellants submit that since that U.S. Supreme Court has never been faced with a case involving such a refund and abatement suit, a more detailed look into this question is warranted.

The term "adequate remedy at law" has been defined as:

> ". . .a remedy which is plain and complete and as a practical and efficient to ends of justice and its prompt administration as a remedy in equity." (emphasis added) Hancock v. Bransham, Tex. Civ. App., 350 S.W. 2d. 95, 957 (1962).

It has been stipulated by The United States that if the IRS does seize and levy upon Appellants' assets ,the result will be irreparable injury to Appellants before the issues determinitive of the assessment can be resolved in a court of law. This is true even though Appellants have complied with the law in every manner regarding the institution of refund suits. Simply put,

the Appellants cannot pay the entire assessment and then litigate the entirety in a refund suit as this would effectively destroy the business of Appellants; yet, Appellants complied with all the requirements for a suit for refund and abatement - the only legal remedy open to them and the IRS still has the power to seize and levy upon Appellants' assets during the pendency of the action, causing irreparable injury to Appellants. In effect, the IRS has the power to decide this case simply by destroying Appellants' business before the court can adjudicate the matter. In such instance, regardless of the outcome of the actual litigation, Appellants have lost.

Appellants have shown that this Honorable Court has indicated that the refund suit would be the proper remedy in the suit brought solely for the purpose of obtaining injunctive relief, that:

> "the legal right to the disputed funds be determined in a suit for refund." (emphasis added)
>
> Enochs, supra
>
> "A collateral objective of the act (is) protection of the collector from litigation pending a suit for refund." (emphasis added)
>
> Enochs, supra. Bob Jones, supra

Yet, it is clear that in the case of partial payment and subsequent suit for refund and abatement, the assessed party in such an action has absolutely no protection against the IRS causing him irreparable injury during the pendency of the refund and abatement suit.

Against the background of the 1866 Anti-Injunction Statute which disfavored Federal injunctions,

> ". . .absent clear proof that available remedies at law were inadequate."
>
> Bob Jones, supra, page 2049

the clear reliance placed upon such a refund suit as the proper and only legal remedy available in this type of suit, and the fact

that this Honorable Court has never had the opportunity to decide a refund and abatement case, it is clear that the original 1866 Act and subsequent Supreme Court decisions have been predicated upon the idea of there being an adequate remedy of law available to the taxpayer, that remedy being that of a refund suit. However, in view of the definition of an adequate remedy at law,

> ". . .a remedy which is plain and complete and as a practical and effective to ends of justice." (emphasis added)
>
> Hancock, supra

and the reliance placed upon a refund suit as being the adequate remedy at law and the circumstances of this case, to-wit: That the Appellants have complied with every requirement to put the assessments at issue, that this is the only remedy available to Appellants and the fact that there is a very real and tangible danger of the IRS causing irreparable injury to Appellants unless enjoined from doing so, the suit for refund and abatement standing without injunctive relief cannot be considered as being an adequate remedy at law. Even if the IRS does not choose to wield its two edged sword of seizure and levy, the mere fact that the IRS retains this power and the capacity to use it at any time, completely negates the idea of there being an adequate remedy at law. How can it be said that the suit for refund and abatement without injunctive relief is "a practical and efficient to ends of justice?" Hancock, supra. The Appellants can eventually triumph in the refund and abatement case, but still lose by virtue of the fact that the IRS has levied and seized their assets during the action, causing irreparable harm to the Appellants even in their victory. Surely, this Honorable Court could not have meant that a "refund suit" would indicate a suit for refund and abatement standing alone as an adequate remedy at law.

(D)

THIS SUIT IS NOT A SUIT FOR "RESTRAINING THE ASSESSMENT OF TAX" AND THUS DOES NOT COME WITHIN THE ANTI-INJUNCTIVE STATUTE.

Title 26, U.S.C. Section 7421 (a) deals with,

> "suits for the purpose of restraining the assessment or collection of tax."

This suit is the authorized procedure for litigating the amount of an assessment made by virtue of a refund and abatement suit. In all the cases decided in this area by the U.S. Supreme Court, the main point has been that these cases were for the sole purpose of injunctive relief. None were brought as a refund or a refund and abatement suit. This refund and abatement action is "brought pursuant to congressionally authorized procedures." Americans, supra, page 762 This refund and abatement suit cannot be said to be for the "purpose of restraining the assessment or collection of tax;" rather it is for the purpose of litigating the amounts of assessment made as to the correctness of such and the law. The injunctive relief requested by Appellants is to avoid irreparable injury during the pendency of the suit for refund and abatement in which the correctness of the IRS assessments will be determined.

The injunctive relief here is secondary to the primary suit with its purpose, granted by Congress and the Courts, of determining the validity of the assessments, not to restrict the collection of the assessed taxes. A review of the record will show that this is the purpose of Appellants' original action.

Nor can this action be in violation of the,

> "Collateral objective of the Act - protection of the collector from litigation pending a suit for refund."
>
> Bob Jones, supra, page 724

as here, the suit for refund has already been instituted by Appellants.

In view of the foregoing, Appellants submit that 28 U.S.C. 7421 (a) is not a bar to the injunctive relief requested and that such relief should be granted.

II.

IF IN THE ALTERNATIVE, THE ANTI–INJUNCTION STATUTE APPLIES, PETITIONERS MEET THE REQUIREMENTS OF THE ENOCHS EXCEPTION TO THE SECTION 7421 (a) ANTI–INJUNCTION BAR.

The test outlined by this Honorable Court to meet the exception to Section 7421 (a) and allow injunctive relief is as follows:

> ". . .only upon proof of the presence of two factors could the literal terms of Section 7421 (a) be avoided: first, irreparable injury, the essential prerequisite of injunctive relief in any case; and second, certainty of success on the merits."
> (emphasis added)
> Enochs, supra

As to the first factor in the test, that of irreparable injury, the United States has stipulated that irreparable harm/injury would be the result if the IRS were to seize and levy upon Appellants' assets. This meets the first factor of the Enochs test.

As to the second factor in the test, that is, certainty of success on the part of the Appellants, the following procedural defects are determinative.

It should be noted that all of the correspondence to Appellants to include notices, assessments, and Final Notices Before Seizure and Levy have been to "Marvel Photo", not to Fred Marvel or Angela Marvel. At no time have there been any assessments of taxes due and owing, or notices thereof, rendered to Appellants, only to"Marvel Photo".

Under the provisions of Title 26 U.S.C. Section 3102, the tax imposed for employment taxes shall be collected by the "employer" of the taxpayer. Under Section 3401 (3) the "employer" is defined as the "person" for whom the individual performs or performed any service of whatever nature as the employee of such person. Under Section 7701 (a) (1), the "person" is defined as an individual, a trust, estate, partnership, association, company or corporation, Out of the above list,

"Marvel Photo" cannot be considered as being an individual, a trust, an estate, an association, or a corporation. Blacks Law Dictionary, Revised Fourth Edition, Page 352 defines "company" as "a society or association of persons in considerable number interested in a common project and uniting themselves for the prosecution usually of some commercial or industrial undertaking or other legitimate business." Thus, "Marvel Photo" cannot be considered as a "company". Furthermore, the Appellants have never held out that "Marvel Photo" was a partnership, rather, the Appellants have always deemed it to be simply a proprietorship and filed their U.S. Individual Income Tax Return accordingly. "Marvel Photo" does not meet the requirements for a partnership. Simply put, it is Appellants' position that Marvel Photo was not a legal entity and could not be considered as being the "employer" required by Title 26 U.S.C., Section 3102. It should again be noted that both the thirty day letter of February 5, 1974, and the Final Notice Before Seizure were addressed to "Marvel Photo," and that such purported assessments or notices are not addressed to the taxpayers or any legal entity. In Cohen v. Gross, CCA NJ 316 F. 2d 521 (1963); the Court held that "assessment is a prescribed procedure for officially recording the fact and amount of a taxpayer's administratively determined tax liability." In our case no assessment has ever been made against a taxpayer but any purported assessment was directed to "Marvel Photo" which was not and has never been a legal entity.

Furthermore, in view of Title 26 U.S.C. Section 6303 (a) which states:

> (a) General Rule - Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

This distinction is very important. All through these proceedings, the notice by the IRS has been given to "Marvel Photo". Yet 26 U.S.C. 6303 (a) requires that notice be given "to each person liable for the unpaid tax." "Marvel Photo" cannot be considered as being a "person" and thus, it is clear that the United States cannot be said to have given adequate notice.

Without this notice, then the assessments are not valid, then the Appellants are certain of their success in this matter and as such meet the Second Factor of the Enochs Test.

Even if it were possible to determine for tax purposes only, that Appellants were partners in "Marvel Photo," (in the face of no partnership agreement, oral or written, and the filing of individual tax returns as a proprietorship and not as a partnership), the case law is clear upon this point. In the case of Coson vs. United States, 169 F.Supp. 671, 3 AFTR 2d 462 (1955), it was held that there was no liability as to Certificates of Assessments issued to the "Moulin Rouge" and two other individuals not listed as partners in the case of Coson, once a limited partner in "Moulin Rouge" Hotel. The basis was the fact that the Certificates of Assessments did not label the "Moulin Rouge"as a partnership nor the two individuals listed as partners - the plaintiff was not listed. The Court held that the underlying tax obligation must be assessed against each individual and the partnership and partners must be labeled as such by name. The Court in Coson held:

> "In addition, counsel for defendant introduced a Certificate of Assessments and Payments (Form 899), pertaining to Alexander Bisno, Louis Rubin, and the Moulin Rouge. The Certificates of Assessments and Payments, the five Assessment Certificates and the five ledger cards referred only to Alexander Bisno, Louis Rubin, and the Moulin Rouge. They neither labeled Bisno or Rubin as a partnership. They did not name the plaintiff, James R. Coson.

In the case of Baugh, Inc. vs. Little Lake Lumber Company, CCA Cal., 297 F.2d 629 (1961), Little Lake Lumber Company was a California partnership made up of C.E. McCullock, Jr., H.W. Bryan and M.L. Kraner. The United States, in its notice of filing of a lien, specifically mentioned one partner (Charles E. McCulloch, et al.) but sought to include the other two under the term "et al." The notice which did not sufficiently name the other two partners was held to be invalid as to their interests. The basis for this decision was the interpretation that the Service had to disclose the names of the taxpayers under a tax lien with reasonable preciseness.

Appellants have certainty of success on the merits as "Marvel Photo" cannot be considered as being an entity for tax purposes or, in the alternative, if "Marvel Photo" is considered

as a partnership, then the assessments are invalid as to Appellants by virtue of the failure of the IRS to list "Marvel Photo" as a partnership and all the partners involved on the assessments and notices.

Appellants have successfully met the two factor test of Enochs and injunctive relief should be granted.

CONCLUSION

In view of the foregoing Brief, the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit erred indenying injunctive relief to Appellants on the following grounds:

1. 26 U.S.C. Section 7421 (a) does not constitute a bar to injunctive relief in view of the fact that this action involves a suit for refund and abatement of employment taxes allegedly due and owing.

2. Appellants meet the requirements for injunctive relief as stated in Enochs v. Williams Packing and Navigation Company.

Appellants submit that certiorari should be granted in view of the foregoing.

Respectfully submitted,

Edgar, Manipella & Hinds

By James L Edgar

James L. Edgar
Attorney for Appellants
Suite 423 Skyline East
6111 East Skelly Drive
Tulsa, Oklahoma 74135
(918) 664-7020

APPENDIX "A"

OPINIONS BELOW

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FRED MARVEL and ANGELA MARVEL,)
dba MARVEL PHOTO,

Plaintiffs-Appellants,)

v.

UNITED STATES OF AMERICA,) No. 75-1825 (75-C-211)

Defendant-Appellee.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Submitted on the Briefs.

James L. Edgar and Stephen A. Milligan of Edgar, Manipella & Hinds, Tulsa, Oklahoma, for Appellants.

Scott P. Crampton, Assistant Attorney General; Gilbert E. Andrews, Crombie J.D. Garrett, Francis J. Gould, Attorneys, Department of Justice, Washington, D.C.; and Nathan G. Graham, United States Attorney, Of Counsel, for Appellee.

Before LEWIS, Chief Judge; BREITENSTEIN and SETH, Circuit Judges.

LEWIS, Chief Judge.

Appellants Fred and Angela Marvel (taxpayers) seek review of a district court order denying their motion for a temporary restraining order and preliminary injunction enjoining the Internal Revenue Service (IRS) from levying on taxpayers' assets during the pendency of their suit for refund and abatement of allegedly unpaid FICA, federal withholding, and federal unemployment taxes. The issue presented is whether the relief

sought is barred by the Anti Injunction Act, 26 U.S.C. § 7421 (a).

I.

Taxpayers, doing business as Marvel Photo, operate a general photographic studio in Tulsa, Oklahoma. On February 5, 1974, the IRS issued a notice of assessment to Marvel Photo for unpaid FICA, federal withholding, and federal unemployment taxes for the period of January 1, 1966 through December 31, 1971. On November 1, 1974, the IRS issued a series of "Final Notices Before Seizure" stating that within ten days, and without further notice, any bank accounts, receivables, commissions, or other income or property belonging to taxpayers would be levied upon or seized. On November 6, 1974, taxpayers paid the employment taxes of one alleged employee for each of the periods in question. On November 8, 1974, a claim for refund of this partial payment was filed with the IRS.

On May 29, 1975, a period of six months having elapsed without a determination of their refund claim by the IRS, taxpayers filed suit in federal district court for refund of the taxes paid and abatement of the remainder of the assessments. In conjunction with this suit taxpayers moved for a temporary restraining order and preliminary injunction enjoining the IRS from levying on taxpayers' assets during the pendency of the litigation. The district court, finding its jurisdiction to grant injunctive relief curtailed by the Anti Injunction Act, 26 U.S.C. § 7421 (a), denied the motion.

II.

The issue presented is one of first impression and requires us to construe the provisions of the Anti Injunction Act, 26 U.S.C. § 7421 (a):

> Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .

Despite the seemingly absolute language of the statute, it has enjoyed a long and variable history of judicial construction ranging from strict enforcement to equation with the ordinary judicial standard for equitable relief. Cf. "State Railroad Tax Cases," 92 U.S. 663, with Miller v. Standard Nut Margaring Co., 284 U.S. 498. The most recent pronouncements by the Supreme Court on this subject, however, must be read as putting an end to this cyclical pattern of construction.

> But the court's unanimous opinion in Williams Packing (Enochs v. Williams Packing & Navigation Co., 370 U.S. 1) indicates that the case was meant to be the capstone to judicial construction of the (Anti Injunction) Act. It spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose.

Bob Jones University v. Simon, 416 U.S. 725, 742. Thus, "the Court in its most recent reading (Williams Packing, supra) gave the Act almost literal effect," subject only to a narrowly construed exception. Id. at 737. The parties agree that in order to invoke this judicial exception the taxpayer must clearly demonstrate "that under no circumstances could the Government' ultimately prevail" and that "equity jurisdiction otherwise exists.'" (See discussion in part III, infra.) Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7.

Notwithstanding the literal wording of the statute and the strict construction adopted by the Supreme Court, taxpayers correctly note that the Supreme Court has never ruled directly on the availability of injunctive relief in suits for refund and that all of the reported decisions have involved suits for injunctive relief prior to any payment of the assessed tax. This absence of authority is primarily attributable to the bifurcated nature of the tax litigation system devised by Congress. In the great majority of tax cases the taxpayer has the option of paying the assessment in full and suing for a refund in district court or of litigating the assessment in the Tax Court prior to payment. In either case injunctive relief from seizure by the IRS during the pendency of the proceedings is unnecessary because the assessment has been paid in full or because seizure is ordinarily barred by statute during litigation in the Tax Court, 26 U.S.C. § 6213 (a).

In cases such as the present involving employment or excise taxes, the Tax Court is without jurisdiction and ordinarily the only remedy available to the taxpayer would be full payment of the assessment followed by a suit for refund in district court. In Flora v. United States, 362 U.S. 145, however, the Supreme Court noted that excise taxes are divisible per transaction or event with the result that the jurisdiction of the district courts may be invoked by payment of the assessed taxes for any one transaction or event without payment of the full assessment. Id. at 175 n.38. This "partial payment" rule has been interpreted by the lower federal courts to include other assessments of "divisible" taxes, including employment and social security taxes, and the IRS has acquiesced in this interpretation. Steele v. United States, 8 Cir., 280 F2 89, 90-91. Thus only in this exceptional class of "partial payment" refund suits is there a possibility of IRS seizure during the pendency of district court refund proceedings.

The essence of taxpayers' arguments in support of injunctive relief from seizure during these "partial payment" refund suits is that without such relief this recognized exception to the full payment rule is rendered meaningless since the IRS could unilaterally require "full payment" at any time by levying on taxpayers' assets. 1/ Such action would not only "deprive" tax-

1/ The IRS, of course, insists there is little likelihood of such a unilateral seizure absent circumstances jeopardizing the availability of the revenue after judgment.

> In practice, in employment tax cases the Internal Revenue Service counterclaims for the balance of the assessment in the taxpayer's refund suit, refraining from taking any steps to enforce collection of the balance pending final disposition of the refund suit, in the absence of jeopardy to the revenue.

Brief for the United States at 8 n.5. In light of our subsequent disposition we need not consider the likelihood of seizure at this juncture. We note in passing, however, that the IRS had a period of at least six months prior to the time suit was instituted in district court in which it had the undisputed power to seize taxpayers' assets. This period having passed without seizure it is unlikely that such action would be instituted during the district court proceedings absent a change in circumstances jeopardizing the revenues – a situation which would likely prompt the district court to set aside its temporary injunction in any event.

payers of their "only available remedy," it being stipulated that they are unable to pay the full amount of the assessment without irreparable injury to their business, but would do nothing to further the purposes of the Act.

Although the Act has essentially no legislative history.

> The Court has interpreted the principal purpose of (the Act) to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, "and to require that the legal right to the disputed sums be determined in a suit for refund." Enochs v. Williams Packing & Navigation Co., supra at 7. . . .

Bob Jones University, supra, at 736-37 (emphasis added) (citations omitted). Similarly, the Supreme Court has identified a "collateral objective" of the Act as "protection of the collector from litigation pending a suit for refund." Williams Packing, supra at 7-8 (emphasis added). Since their motion for injunctive relief was made only after a suit for refund has been filed, taxpayers maintain they have complied with the congressionally prescribed procedure for determining "the legal right to the disputed sums" and that both the principal and the collateral purposes of the Act have been satisfied.

Taxpayers seek support for this contention in two statements by the Supreme Court that the range of remedies available in refund suits has not been determined. In Bob Jones, supra, the Supreme Court denied petitioner's suit for injunctive relief enjoining the IRS from withdrawing its 501(c)(3) status as a tax-exempt orgainzation prior to collection or payment of the tax, but noted:

> Petitioner did not bring this case as a refund action. Accordingly, we have no occasion to decide whether the Service is correct in asserting that a district court may not issue an injunction in such a suit, but is restricted, in any tax case to the issuance of money judgments against the United States. . . We note, however, that the Service's position with regard to the range of relief available in a refund suit raises several considerations not presented by a pre-enforcement suit for an injunction. For example, it may be possible to conclude that a suit for a refund is not "for the purpose of restraining the assessment or collection of any tax. . . ," and thus that neither the literal terms nor the principal purpose of § 7421(a) is applicable. Moreover, such a suit obviously does not clash with what the Court referred to in Williams Packing, supra, as a "collateral objective of the Act–protection of the collector from litigation pending a suit for refund." 370 U.S. at 7-8. . . .

Id. at 748 n.22 (citations omitted). The same conclusion was reached in Commissioner v. "Americans United" Inc., 416 U.S. 752, another 501(c)(3) case decided the same day as Bob Jones:

> . . . As noted in Bob Jones, . . . we need not decide now the range of remedies available in such a refund suit, which, unlike this suit, is brought pursuant to congressionally authorized procedures.

Id. at 763 n.13 (citation omitted).

Taken in context, however, these statements offer no comfort to taxpayers' position. A more complete reading of these cases indicates the Supreme Court was concerned with the range of remedies available after a final determination had been reached in a refund suit, viz., whether a district court could

enjoin the IRS from withdrawing an organization's 501(c)(3) status after the legality of the organization's claim to such status had been judicially determined. Thus, the remainder of the footnote cited from Bob Jones, supra, states:

> . . . And there would be serious question about the reasonableness of a system that forced a § 501(c)(3) organization to bring a series of backward-looking refund suits in order to establish repeatedly the legality of its claim to tax-exempt status and that precluded such an organization from obtaining prospective relief even though it utilized an avenue of review mandated by Congress.
>
> The Service indicates that "its normal practice is to issue a favorable ruling upon the application of an organization which has prevailed in a court suit." . . . When the Service adheres to that position following a refund suit decided in favor of the plaintiff, there is of course little likelihood that injunctive relief would be necessary or appropriate. But our decision today that § 7421 (a) bars preenforcement injunctive suits by organizations claiming § 501(c)(3) status unless the standards of Williams Packing are met should not be interpreted as deciding whether injunctive relief is possible in a refund suit in a district court.

Id. at 748 n.22 (emphasis added) (citations omitted). Indeed, the Supreme Court's statement may be read as a reaffirmation of its primary holding that ". . . § 7421 (a) bars preenforcement injunctive suits . . . unless the standards of Williams Packing are met. . . ." Id. (emphasis added).

Taxpayers' final argument that injunctive relief is not barred either by the express language of or the congressional purposes for the Act is that it "was written against the background of general equitable principles disfavoring the issuance of federal injunctions against taxes, absent clear proof that available remedies at law were inadequate," citing Bob Jones, supra, at 742 n.16 (emphasis added) (citations omitted). Taxpayers claim that a suit for refund and abatement without

injunctive relief is an "inadequate remedy at law" derives from their contention that the IRS could in effect "litigate" their suit prior to a final judicial determination simply by seizing taxpayers' assets. Since it is stipulated that seizure would cause irreparable harm to taxpayers by "ruining" their business, taxpayers insist that even if they were ultimately to "win" their suit on the merits they still would have "lost" as a result of the intervening destruction of their business. This, they maintain, cannot be equated with an "adequate" remedy at law.

As previously demonstrated, however, this contention has already been considered and expressly rejected by the Supreme Court.

> Williams Packing switched the focus of the extraordinary and exceptional circumstances test from a showing of the degree of harm to the plaintiff absent an injunction to the requirement that it be established that the Service's action is plainly without a legal basis. The Court in essence read Standard Nut not as an instance of irreparable injury but as a case where the Service had no chance of success on the merits. 370 U.S., at 7. And the Court explicitly held that the Act may not be evaded "merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise." Id., at 6. Yet petitioner's argument that we should find Williams Packing inapplicable turns, in the last analysis, on its claim that to do otherwise would subject it to great harm. The Court rejected that consideration in Williams Packing itself, and we reject it as a reason for finding that case not controlling. Under the language of the Act, the degree of harm is not a factor, and as a matter of judicial construction, it does not provide a meaningful stopping point between Standard Nut and Williams Packing. Acceptance of petitioner's irreparable injury argument would simply revive the evisceration of the Act inherent in Standard Nut.

Bob Jones, supra at 745-46. Moreover, in Flora v. United States, supra, from which the partial payment exception for "divisible" taxes seems to have developed, the Supreme Court expressly considered the hardship imposed upon taxpayers by requiring full payment of the tax prior to filing suit for a refund in district court. Although the Supreme Court refused to allow refund suits in district courts prior to full payment in cases involving other types of taxes, it expressed no doubt that if such suits were allowed the assets of taxpayers would continue to be subject to distraint during the pendency of the district court proceedings.

> Of course, the Government can collect the tax from a District Court suitor by exercising its power of distraint- -if he does not split his cause of action (by litigating the remainder of his assessment in the Tax Court)- -but we cannot believe that compelling resort to this extraordinary procedure is either wise or in accord with congressional intent.

Id. at 176. Admittedly, the above-quoted statement is dictum, but in light of the extensive consideration given the Flora opinion in the context of a full rehearing, we believe it is "carefully considered dictum" and find its reasoning persuasive. Id. at 155.

In summary, the literal wording of the Act, the strict pattern of construction adopted by the Supreme Court, and the great deference afforded by the Supreme Court to the government's interest in the prompt collection and enforcement of taxes all require us to conclude that creation of a new judicial exception to the applicability of the Act in suits for refund and abatement is impermissible.

III.

Taxpayers nevertheless contend they have satisfied the requirements for injunctive relief under the exception already created by Williams Packing, supra. As previously noted the Williams Packing exception requires a showing "that under no circumstances could the Government ultimately prevail" and that "equity jurisdiction otherwise exists." Id. at 7. Although it is stipulated that seizure of taxpayers' assets would result in irreparable injury, the prerequisite for all equitable relief, taxpayers face a heavy burden under the "no circumstances"

portion of the Williams Packing test. In describing this "stringent standard" the Supreme Court stated that only if it were apparent "on the basis of information available to the Government at the time of the suit . . . 'that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained.'" Bob Jones, supra, at 737, citing Williams Packing, supra, at 7. "Thus, in general, the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid." Williams Packing, supra at 8.

In the present case an assessment has been made and there is no allegation of bad faith on the part of the IRS. Rather taxpayers' defense is based entirely on an alleged technical defect in the notice of assessment, viz., that the assessment was addressed to Marvel Photo and not to Fred and Angela Marvel in their individual capacities, or to Fred and Angela Marvel dba Marvel Photo, or to Marvel Photo, a partnership, with Fred and Angela Marvel separately listed as partners. Adopting as we must the "most liberal view of the law," we cannot say there are "no circumstances" under which taxpayers could be found to have been engaged in a partnership for tax purposes or that notice addressed to the partnership, albeit without specifically designating it as such, was not sufficient notice to the partners. 2/

Taxpayers having failed to meet their burden of proof under the Williams Packing exception, the district court properly denied the requested injunctive relief. The order of the district court is therefore affirmed and the case remanded for further proceedings consistent with this opinion.

2/ This conclusion should not be interpreted as in any way expressing our views on the proper resolution of this issue under the normal standards of proof applicable at trial.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRED MARVEL and ANGELA MARVEL, d/b/a MARVEL PHOTO, Plaintiff,	)	75-C-211
vs.	)	
UNITED STATES OF AMERICA, Defendant.	)	

ORDER

This matter originally came on for hearing before this Court on July 8, 1975. The matter before the Court was Plaintiff's Motion for Restraining Order and Preliminary Injunction. The parties have filed briefs and proposed Findings of Fact and Conclusions of Law.

At the conclusion of the hearing on July 8, 1975, the Court took the Motion under advisement, directing the parties to file briefs and proposed Findings of Fact and Conclusions of Law.

The matter is now ripe for a determination by the Court as to whether the Motion should be sustained or overruled.

It appears from the record that on or about November 1, 1974, plaintiffs received from the District Director of Internal Revenue a "Final Notice Before Seizure" relating to an assessment made by the Internal Revenue Service for allegedly unpaid FICA taxes, and Federal Withholding and Federal Unemployment sums allegedly due and owing from plaintiffs for the periods of January 1, 1971, through December 31, 1972.

It further appears that on November 6, 1974, plaintiffs made a partial payment of the assessed taxes and on November 8, 1975, filed a claim for refund of all the assessed taxes with the District Director of the Internal Revenue Service.

On May 29, 1975, plaintiffs filed the instant litigation, seeking a judgment against the United States for the full amounts previously assessed against plaintiffs by the Internal Revenue Service, together with a Motion for a Restraining Order and Preliminary Injunction. As part of the exhibits attached to said Motion is an Affidavit of Fred Marvel.

The key issue in this litigation will probably be the determination of the status — as "employees" or as "independent contractors" — of certain persons who worked at plaintiffs' premises and at other premises in connection with plaintiffs' business during the years in question.

By stipulation for the purposes of the present motion and hearing, plaintiff has shown that irreparable harm would befall plaintiffs should the Internal Revenue Service seize plaintiffs' assets pursuant to the assessment and notice of seizure in question.

No evidence was presented by plaintiff to support their argument that there were procedural defects in the assessments against plaintiffs by the Internal Revenue Service.

This Court can find no reason for treating this case differently, as a motion for preliminary injunction, from the cases of Enochs v. Williams Packing & Navigation Co. (1962) 370 U.S. 1; Bob Jones University v. Simon (1974) 416 U.S. 725; and Alexander v. American's United, Inc. (1974) 416 U.S. 752, which all dealt with suits for permanent injunction.

The Court, having read and considered footnote 22 in the case of Bob Jones University v. Simon, supra, and having noted that the plaintiffs here have filed an apparently proper coincident suit for refund against the United States, finds that, nevertheless, this motion by plaintiffs is subject to the prohibitions of Section 7421 (a) of Title 26 U.S.C.A., Enochs v. Williams Packing, supra, and the clear intent of Congress as noted therein.

The Court, therefore, finds that its jurisdiction to entertain plaintiffs' motion is therefore governed by Section 7421 (a), subject only to the limitations expressed in Williams Packing, supra, as reiterated in Bob Jones University, supra, and Alexander v. American's United, Inc., supra.

The Court finds, based on the evidence before the Court, that it cannot be said that "under no circumstances could the Government ultimately prevail" in this action.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiffs' Motion for Restraining Order and Preliminary Injunction be and the same is hereby denied.

ENTERED this 27th day of August, 1975.

ALLEN E. BARROW
CHIEF UNITED STATES DISTRICT JUDGE

CERTIFICATE OF MAILING

I, James L. Edgar, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8 day of April, 1977, I mailed three true and correct copies of the above and foregoing Petition for Certiorari, with proper postage thereon fully prepaid, to:

Mr. Ken Snoke
U.S. Attorney
Northern District of Oklahoma
United States Court House
Tulsa, Oklahoma 74103

Mr. William W. Guild
Attorney, Tax Division
Department of Justice
Room 8B37
1100 Commerce Street
Dallas, Texas 75202

Further, in compliance with Supreme Court Rule 33, I certify that I mailed three true and correct copies by air mail, with proper postage thereon fully prepaid, to:

Mr. Frank Gould
Attorney, Appellate Section
Tax Division
Department of Justice
Washington, D.C. 20530

Solicitor General
Department of Justice
Washington, D.C. 20530

James L. Edgar

Supreme Court, U. S.
FILED
MAY 31 1977
MICHAEL RODAK, JR., CLERK

No. 76-1389

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRED MARVEL AND ANGELA MARVEL,
d/b/a MARVEL PHOTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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FRED MARVEL AND ANGELA MARVEL,
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the refusal of the courts below to enjoin, during the pendency of their suit for refund and abatement, the collection of assessed social security (FICA) taxes (26 U.S.C. 3101), taxes withheld at the source on wages (26 U.S.C. 3401) and unemployment (FUTA) taxes (26 U.S.C. 3301).

The pertinent facts are as follows: Petitioners, doing business as Marvel Photo, operated a photography studio. The Internal Revenue Service assessed Marvel Photo for unpaid FICA, withholding of income, and FUTA taxes and issued to Marvel Photo a "Final Notice Before Seizure." Petitioners paid these employment taxes for one alleged employee of Marvel Photo and brought suit in the United

States District Court for the Northern District of Oklahoma for refund of the taxes paid and abatement of the balance of the assessment (Pet. App. A, p. 16).[1]

In the district court, petitioners moved for a temporary restraining order and preliminary injunction enjoining the Internal Revenue Service from levying upon their assets for the unpaid assessments during the pendency of the litigation (Pet. App. A, p. 16). The district court held that the Anti-Injunction Act, 26 U.S.C. 7421(a), barred petitioners' suit (Pet. App. A, pp. 25-27). The court of appeals affirmed (Pet. App. A, pp. 15-17).

The decision below correctly held that the Anti-Injunction Act barred this action under *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, *Bob Jones University* v. *Simon*, 416 U.S. 725, and *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752. Indeed, *Williams Packing Co.* similarly involved an attempt to enjoin the collection of employment taxes. These decisions hold that "§7421(a) bars pre-enforcement injunctive suits * * * unless the standards of *Williams Packing* are met * * *." *Bob Jones University* v. *Simon, supra*, 416 U.S. at 748, n. 22. Under the standards of *Williams Packing*, a taxpayer cannot enjoin the assessment or collection of taxes unless he can show: (1) that under no circumstances will the government prevail on the merits of its claim; and (2) that equity jurisdiction otherwise exists.

[1] Although 26 U.S.C. 6404 authorizes the Secretary of Treasury or his delegate to abate assessments, there is no requirement that he do so, and the district courts do not have jurisdiction to require him to do so. *Poretto* v. *Usry*, 295 F. 2d 499 (C.A. 5), certiorari denied, 369 U.S. 810; *Etheridge* v. *United States*, 300 F. 2d 906 (C.A. D.C.). See *Graham* v. *Du Pont*, 262 U.S. 234. Moreover, a suit for the abatement of assessed federal taxes is simply a suit for injunctive relief. Such a suit is generally prohibited by the Anti-Injunction Act, 26 U.S.C. 7421(a), which bars suits to enjoin the assessment or collection of taxes.

Thus, the purpose of the Anti-Injunction Act is to protect "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference" (416 U.S. at 736).

Petitioners argue that in *Bob Jones University* v. *Simon, supra*, 416 U.S. at 748, n. 22, and in *Alexander* v. *"Americans United" Inc., supra*, 416 U.S. at 757, n. 9, this Court left open the question of the range of relief, including injunctive relief, available in a suit for refund (Pet. 5-6). But the court of appeals correctly recognized (Pet. App. A, pp. 20-21) that the cited references indicate that this Court was primarily concerned with the range of remedies available *after* a final determination had been reached in a refund suit and not during the pendency of a refund suit.

Moreover, as both courts below properly concluded (Pet. App. A, pp. 23-24, 26), petitioners do not qualify for the exception to the Anti-Injunction Act established in *Enochs* v. *Williams Packing Co., supra*, 370 U.S. at 7, because they have not shown that under no circumstances could the government prevail on the merits of its claim. See *Bob Jones University* v. *Simon, supra*, 416 U.S. at 737. The question whether the United States can ultimately prevail must "be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Enochs* v. *Williams Packing Co., supra*, 370 U.S. at 7.

While petitioners claim that procedural defects in the assessment of the employment taxes, in the notices of assessment and in the demands for payment of the assessed taxes make their success on the merits a certainty, the district court found that they failed to present any evidence

supporting this argument (Pet. App. A. p. 26). There is accordingly no basis to their claim for injunctive relief.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

DOJ-1977-05